COMMUTATION TICKETS AND RATE REGULATION.

The "rate-making" power of the Interstate Commerce Commission is set forth in the Hepburn Bill in rather sweeping terms. The Commission is authorized whenever, after full hearing, it shall be of the opinion that *"any of the rates or charges whatsoever,"* demanded by any common carrier subject to the Act to Regulate Commerce for the transportation of persons or property, are unjust or unreasonable, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged." Comprehensive as the language of the statute is, there are certain limitations upon the rate-fixing powers of the Commission which were possibly not anticipated by some of the proponents of the law, and which have doubtless escaped the observation of some lawyers who are otherwise well informed upon the general subject of Rate Regulation.

A very practical example of such limitation is illustrated in the case of the ordinary monthly and quarterly tickets used the country over by the rapidly increasing armies of commuters. These tickets are sold by the railway companies at greatly reduced rates —sometimes less than one-half cent per mile—and their sale by the carriers is permitted under Section twenty-two of the Interstate Commerce Act. To state that a carrier which has for many years sold a certain commutation ticket at a reduced rate to induce persons to make their homes in suburban sections to which the rate applies, may suddenly, arbitrarily, and for the mere purpose of increasing revenues already ample to pay fixed charges, operating expenses and dividends, increase such rate twenty-five or fifty per cent. or withdraw such commutation ticket altogether, may cause some feeling of uneasiness in growing suburban localities. To add that in many such cases, even under the broad powers conferred by the Hepburn Amendments, the Interstate Commerce Commission could probably afford no very practical relief, would doubtless result in a very careful scrutiny of authorities. Nevertheless there seems reason to believe that both propositions may be successfully established.

Nor are we supposing a course of action which no railway management would likely pursue. On the contrary, what appears to be just such a course as that suggested has recently been fol-

lowed by a company which operates a line extending from Pennsylvania to the various settlements in Southern New Jersey.[1] For many years this company has sold various forms of commutation tickets covering the points on its line, and the favorable rates thus offered have been one of the inducements to suburban residence in South Jersey. On the first of June, 1908, the company put into effect a schedule of advanced fares, which in one instance increased the price of the monthly ticket over twenty-six per cent., the quarterly ticket sixty-three per cent., the monthly school ticket about forty-six per cent. In another case the price of the quarterly ticket was advanced thirty-eight per cent., and that of the school ticket over thirty-three per cent.

The company offered certain reasons in justification of its course, some of which unquestionably merit consideration, but it seems from an application of the usual tests that under the old rates the road had done very well financially, and would doubtless have so continued but for the depression marked by the recent panic. Its expenditures for maintenance had been liberal, it had paid fixed charges and operating expenses, and an unbroken series of five and six per cent. dividends upon its stock. In addition it had earned each year a considerable surplus, which should at least in part be translated into dividends in determining whether or not the road earned under the old rate that reasonable return upon the value of the property devoted to public use to which it is properly entitled.[2] As for the fact that during the recent panic and its succeeding recession the revenues of the road were materially reduced, that in itself would not necessarily warrant an advance in rates or fares.[3]

In view of the foregoing it would seem that the long-established rates and fares on such a road should not have been advanced without a substantial justification by the carrier. Such has been the repeated holding of the Commission and the Courts.[4] But

[1]West Jersey & Seashore Railroad.

[2]Illinois Cent. R. R. *v.* Inter. Com. Comm. (1907) 206 U. S. 441; Cattle Raisers' Ass'n *v.* M. K. & T. R. R. (1908) 13 I. C. C. Rep. 418, at 432; Smyth *v.* Ames (1898) 169 U. S. 466. But see Cotting *v.* Kansas City Stock Yards Co. (1901) 183 U. S. 79.

[3]*Re* Proposed Advance in Frt. Rates (1903) 9 I. C. C. Rep. 382; Rates from St. Louis, etc. (1905) 11 I. C. C. Rep. 238; Steenerson *v.* Gt. N. Ry. (1897) 69 Minn. 353.

[4]Coxe Bros. *v.* Lehigh Valley R. R. (1891) 4 I. C. C. Rep. 535; Holmes *v.* Southern R. R. (1900) 8 I. C. C. Rep. 561; Warren Mfg. Co. *v.* Southern R. R. (1907) 12 I. C. C. Rep. 381; Cotting *v.* Kansas City Stock Yards Co., *supra*, at 97-8; I. C. C. *v.* C. Gt. W. R. R. (U. S. Sup. Ct. March 23, 1908). See also Banner Milling Co. *v.* N. Y. C. R. R. (1908) 14 I. C. C. Rep. 398.

suppose a resident of South Jersey, deeming himself injured by the above-mentioned advance in commutation fares, should file a complaint with the Commission. Obviously the most practical remedy he could seek would be an order from the Commission fixing such fares at the old established rates. Could the Commission in the case stated make such an order? Probably not.

The answer is to be found in *Sprigg* v. *Baltimore & Ohio R. R. Co.*[5] This case was decided by the Commission about six years prior to the passage of the Hepburn Bill, at which time the Commission had no rate-making power.[6] The opinion (by Chairman Knapp) discusses generally the regulation of commutation fares and the power of Congress or its creature commission over such charges, and holds that ordinarily a carrier cannot be compelled to issue commutation tickets or to restore such tickets where they have been withdrawn. The specific holding of the Commission in the *Sprigg* Case does not in so many words include the question of an advance in fares, but the reasoning of the opinion leaves no doubt as to the limitations with which, in the opinion of the Commission, the Government's rate-making power is hedged about in the case of commutation tickets. To quote from the opinion:

"In whatever aspect the question is considered, the argument for complainants comes to this, that carriers can be compelled, under such circumstances as are disclosed in this case, to put in discriminating rates, provided they are not unduly discriminating. Because they are permitted to sell commutation tickets, therefore they can be forced to do so. At least, if they have sold such tickets for a considerable period they can be required to continue to sell them, although at a rate much below the sum justly charged to the general public.—There is no legal basis for such a contention. If we had full rate-making power, as ample and complete as that possessed by the Congress itself, we could not make such an order. We could in that case prescribe a rate which would be reasonable for everybody to pay, and in determining what that rate should be we could take into account the price at which commutation tickets had been sold, the length of time they were furnished, and all other facts bearing upon the reasonableness of a common public rate for the territory and travel in question; but we could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class."

This conclusion is fully supported by *Lake Shore & M. S. R. Co.* v. *Smith*,[7] decided by the Supreme Court of the United States

[5](1900) 8 I. C. C. Rep. 443.
[6]I. C. C. *v.* C. N. O. & T. P. Ry. Co. (1897) 167 U. S. 479.
[7](1899) 173 U. S. 684; 19 Sup. Ct. Rep. 565.

in April, 1899. In that case a statute of Michigan which sought to compel the sale of 1,000-mile tickets at lower rates than those fixed for ordinary passenger travel was held unconstitutional. The question decided by the court is stated to be:

"whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, * * * and having power to alter, amend or repeal their charters, * * * has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs, and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law."

This question is answered in the negative, and the following extracts from the opinion will indicate the line of reasoning adopted:

"The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statutes regulating rates and charges, and, notwithstanding such rates, it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates,—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule."

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community, and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof."

As already indicated, the *Sprigg* Case was decided before Congress had delegated any rate-fixing authority to the Commission. There was a vigorous dissenting opinion by Commissioner Clements, and it might have been assumed that the position the Commission would take in the event of the same subject coming before it subsequent to the passage of the Hepburn Amendments, was a question fairly open to doubt.

The subject, however, has in a slightly different form recently been presented for discussion and decision by the Commission in the case of *Field* v. *Southern Ry.*[8] and the ruling in the *Sprigg*

[8](1908) 13 I. C. C. Rep. 298.

Case distinctly approved. The following is quoted from the opinion, which is by Commissioner Harlan:

"The prayer of this petition is that the Commission shall enter an order requiring the defendants to re-establish the special party rates which in past years have generally been accorded by carriers to theatrical companies and other special organizations engaged in giving public exhibitions.

"It is clear that the Commission has no authority to enter such an order. While the act to regulate commerce as amended confers upon the Commission the power to reduce a passenger fare alleged to be excessive, when a complaint to that effect has been filed and the issue thus made has been supported by competent testimony, it has vested in the commission no affirmative power to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions, or for a special purpose. This was so held in *Cator* v. *Southern Pacific Co. et al.*,[9] and in *Sprigg* v. *Baltimore & Ohio R. R. Co. et al.*,[10] and the question is not to be regarded therefore as open to further discussion."

It would seem, then, that the ruling of the *Sprigg* Case is to stand, at least until the Commission's holding is modified or reversed.

Returning to the case of the commuter living along the line of the South Jersey road who finds that the price of the commutation ticket which he has been using for years has been suddenly advanced, say sixty-three per cent., and that the school tickets he has been buying for his children have been advanced forty-six per cent., it seems difficult to suggest how the Commission can make an order which will restore to him the old rates which were presumptively reasonable and which, let us assume, had been increased without good cause. If he filed his complaint, the Commission could look into the subject of passenger rates and make an order fixing a reasonable rate for all travellers. In fixing such rate it could take into account the old commutation rate, the time it had been in effect and all facts bearing upon the general question of the reasonableness of a rate to be paid by everybody; but it "could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class"—say for a class who travel every day.

In fact the Commission could do no more than to fix a single fare rate, open to everyone who took a given journey, whether

[9](1893) 6 I. C. C. Rep. 113.
[10](1900) 8 I. C. C. Rep. 443.

he travelled once a year or twice a day; whether he journeyed alone or with a party of fifty. In a word, the Commission would seem to deny the power of the government to fix a rate upon the "wholesale" principle if the proposed "wholesale" rate differed from the "common public rate" for "everybody to pay."

This "wholesale" principle has been more or less discussed in connection with the question of the regulation of railway rates. The subject has not yet been satisfactorily worked out in all phases, but there are decisions by the Courts and the Interstate Commerce Commission and discussions by text-writers which may be profitably examined.

With respect to freight rates it seems to be established that a difference in rates based merely upon quantity is unlawful. That is to say, there may be no strictly "wholesale" freight rates. In *Burlington, C. R. & N. Ry. Co.* v. *Northwestern Fuel Co.*,[11] the Court (Mr. Justice Brewer) said in speaking of a contract which favored a shipper simply because of the large amount of freight transported:

"That such a discrimination is against public policy, and not to be sustained, I am very clear. On the face of it, it is a discrimination based not upon the cost of transportation, upon the time and labor and annoyance which may result to the railroad company, but solely upon the amount of transportation."

A similar ruling was made (Thayer, Judge) in *United States* v. *Tozer*.[12]

In the case of *Providence Coal Co.* v. *Prov. & Worcester R. R. Co.*,[13] the Commission (*per* Chairman Cooley) condemned the offering by the railway company of a ten per cent. discount from its regular rates to any company receiving shipments of coal amounting to thirty thousand tons or more *per* year. Judge Noyes in discussing the subject of discrimination says,[14] "The general principle of an allowance for quantity—*a preferential rate for large shippers*—is indefensible." And in the very recent decision by the Commission in *Cal. Commercial Ass'n* v. *Wells, Fargo & Co.*,[15] in which the Commission quotes the above expression from Judge Noyes' work, the following language is used by Commissioner Lane, who wrote the majority opinion:[16]

[11](1887) 31 Fed. 652.
[12](1889) 39 Fed. 369.
[13](1887) 1 I. C. C. Rep. 107.
[14]American Railroad Rates, page 103. The italics are the present writer's.
[15](1908) 14 I. C. C. Rep. 422.
[16]Commissioners Knapp and Harlan dissented from the general proposition sustained by the majority, which was to the effect that a forwarder may "bulk" shipments of various consignors and ship at car-load rates.

"It appears thus to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service."

"Difference in the cost of service" then does seem to warrant the carrier's charging different rates for carrying the same commodity. As stated by Judson in his excellent treatise on "Interstate Commerce:

"While discrimination based merely on the quantity shipped is not justified, discrimination is proper when it is based on difference in the cost of handling." [17]

It is by application of this principle of difference of cost of handling that the carriers are able to justify charging considerably lower rates on car-load than on less than car-load lots. In *Scofield* v. *L. S. & M. S.*[18] the Commission said:

"Reasons that are substantial exist for making the rate lower *per* barrel in car-load lots than in less than car-load quantities. The cost of service is very considerably less in the case of shipments in car-load lots than in less than car-load quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the car-load goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way-bill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than car-load quantities. There is but one collection of charges for freight.

"Where the shipment is made in less than car-load quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the way-bill. The shipment is by a local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a car-load shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation." [19]

From the point of view of a practical shipper, however, a preferential car-load rate looks very much like what he would term a

[17] Page 195.

[18] (1888) 2 I. C. C. Rep. 90.

[19] See also Beale & Wyman, "Railroad Rate Regulation," Chap. XXIII; Harvard Co. *v.* The Penn. Co. et al. (1890) 4 I. C. C. Rep. 212.

"wholesale" rate; and he knows that such rates are and for a long time have been made by the carriers, and that they are open only to a special class in the community, namely, those who are willing and able to ship a car-load at a time.

This last statement is to be modified to the extent made necessary by the recently announced decision of the Commission in the case of *Export Shipping Co.* v. *Wabash R. R.*,[20] and that of *Cal. Commercial Ass'n* v. *Wells, Fargo & Co.*[21] which hold that a number of shipments from various merchants may be "bulked" by a forwarder and shipped to an individual distributing consignee at the car-load rate regardless of the question of ownership. In the head note to the *Wells, Fargo* Case it is stated that:

"The *cost* of carrying a 'bulked shipment' is not greater than the *cost* of carrying the same amount of freight at the instance of an individual owner. The charges must therefore be the same in each case."

It is still true, nevertheless, that the car-load rate is available only to the shipper who can offer a car-load of freight at a time, or who is so circumstanced that he can employ a forwarder who is able to induce other shippers of the same commodity from the same point of origin to bulk their freight with his and make up a car-load lot. It is equally true that notwithstanding the logic employed by the Commission in the *Sprigg* Case, to the effect that neither they nor Congress itself could fix a passenger rate available only to those who are willing and able to pay for a monthly commutation ticket, for example, yet the same Commission finds no difficulty in fixing "car-load" freight rates. They are to-day making such rates right along[22] and it seems difficult to distinguish their action in principle from the making of a commutation passenger rate.

Justification for the lower rate is the same in each case and depends upon decreased cost of the service. The cost of service in carrying commuters can easily be shown to be less than that in the case of "one-way" passengers. The commuter is given one ticket for say sixty rides; the single trip travellers require sixty tickets for the same service. The cost of printing and labor required to make and sell one commutation ticket is probably little more than one sixtieth of that required in the case of the

[20](1908) 14 I. C. C. Rep. 437.

[21]*Supra.*

[22]National Petroleum Ass'n *v.* C. M. & St. P. R. R. (1908) 14 I. C. C. Rep. 287; Greater Des Moines Comm. *v.* C. G. W. R. R. Co. (1908) 14 I. C. C. Rep. 294.

sixty single tickets, and auditing and accounting expenses connected with handling commutation and single fare tickets respectively stand on a similar basis of comparison. Moreover, the commuter requires less assistance and directing than the stranger on the road, and in the ordinary case does not have the usual trunks and baggage which the railroad carries free of charge for the traveller who journeys but seldom. The commuter pays for his sixty rides in advance and the company has the use of the money. The "one-way" travellers pay for their sixty rides one at a time and retain for themselves the use of the money represented by the other fifty-nine rides. Altogether the differences in cost of service seem to be just as marked in the case of commuters as compared with "one-way" travellers, as they are in the case of car-load consignments of freight as compared with less than car-load lots. Now the Commission does fix car-load freight rates. It does not, and holds that neither itself nor Congress can, fix commutation fares at a rate below the sum justly charged to the general public; in other words, at a rate less than the one-way single fare.

This apparent inconsistency seems to be more marked when it is considered that there has been no such interdiction by the Courts and text-writers against the application of the "wholesale" principle to passenger rates as there has been in the case of freight rates. In the *Party Rate* Case[23] the Supreme Court used the following language:[24]

"It (The Interstate Commerce Act) was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the *principle that one can sell at wholesale cheaper than at retail.*[25] It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. * * * In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita,* then such reduction was reasonable and just in the interests both of the carrier and of the public."

In the same case the Court, after pointing out the evil effect of granting to certain shippers a preferential freight rate, said:[26]

[23]Interstate Com. Comm. *v.* B. & O. Railroad (1892) 145 U. S. 263.
[24]At page 276.
[25]The italics are the writer's.
[26]At page 280.

"The same result, however, does not follow from the sale of tickets for a number of persons at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is enabled at a particular instance to travel at a less rate than he." [27]

It seems difficult to suggest under the present decisions how a complete and practical regulation of existing passenger fares by Commission is to be worked out. Possibly the rulings herein discussed may, if they prevail, make for flat rates *per* mile for all passenger transportation. Such rates are not without advocates, who hope that some day there will be established a "zone" system of fares, under which a traveller may ride as long and as far as he likes within a given zone for one fare. Such a system of charges is of course already in effect in street car transportation and the extension of its use may not be an improbability. In any event, it is not likely that a generation which has compelled a serious attempt at the practical regulation of railway rates by government will be satisfied with any plan which is not complete and comprehensive.

BORDEN D. WHITING.

NEWARK, N. J.

[27] See also Judson on Interstate Commerce, § 154.